2008

Sonya Capri Bangerter v. Ralph Petty; Jarmaccc Properties, LLC; Jarmaccc, Inc; John Does 1-10 : Brief of Appellant

Utah Supreme Court

Ralph C. Petty; Attorney for Respondents.
James C. Haskins; Ryan M. James; Attorneys for petitioner.

SUPREME COURT OF THE STATE OF UTAH

SONYA CAPRI BANGERTER, Petitioner vs. RALPH PETTY, an individual; JARMACCC PROPERTIES, LLC, a Utah limited liability company; JARMACCC, INC., a Utah Corporation, and JOHN DOES 1 through 10, individuals and entities whose true names are unknown, and who may claim some right, title, estate, lien or interest in real property owned by Plaintiff, Respondent.	Supreme Court No. 20080562-SC Appellate Court No. 20060511-CA District Court No. 040900081

BRIEF OF APPELLANT

On Writ of Certiorari from judgment entered by the
Utah Court of Appeals in
BANGERTER v. PETTY, 184 P.3d 1249 (Utah Ct. App. 2008)
Before Judges Greenwood, Billings, and Orme

Ralph C. Petty
Attorney for Respondent
10 W. Broadway, Suite 800
Salt Lake City, Utah 84101

James C. Haskins (#1406)
Ryan M. James (#10946)
HASKINS & ASSOCIATES, L.L.C.
Attorneys for Petitioner
136 East South Temple, Suite 1420
Salt Lake City, Utah 84111
Telephone: (801) 539-0234
Fax No: (801) 539-5210

SUPREME COURT OF THE STATE OF UTAH

SONYA CAPRI BANGERTER, Petitioner vs. RALPH PETTY, an individual; JARMACCC PROPERTIES, LLC, a Utah limited liability company; JARMACCC, INC., a Utah Corporation, and JOHN DOES 1 through 10, individuals and entities whose true names are unknown, and who may claim some right, title, estate, lien or interest in real property owned by Plaintiff, Respondent.	Supreme Court No. 20080562-SC Appellate Court No. 20060511-CA District Court No. 040900081

BRIEF OF APPELLANT

On Writ of Certiorari from judgment entered by the
Utah Court of Appeals in
BANGERTER v. PETTY, 184 P.3d 1249 (Utah Ct. App. 2008)
Before Judges Greenwood, Billings, and Orme

Ralph C. Petty
Attorney for Respondent
10 W. Broadway, Suite 800
Salt Lake City, Utah 84101

James C. Haskins (#1406)
Ryan M. James (#10946)
HASKINS & ASSOCIATES, L.L.C.
Attorneys for Petitioner
136 East South Temple, Suite 1420
Salt Lake City, Utah 84111
Telephone: (801) 539-0234
Fax No: (801) 539-5210

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

The Court of Appeals issued its decision below on May 1, 2008. There has been no petition for rehearing. There was an extension of time granted for Petitioner to file this Petition on June 2, 2008. Jurisdiction is appropriate with this Court under UTAH CODE ANN. §78A-3-102(3)(a) (2008).

STATEMENT OF ISSUES FOR REVIEW

Whether the Court of Appeals erred in holding Respondent sufficiently and timely presented its statute of limitations defenses? The applicability of a statute of limitations is a question of law, reviewed for correctness. *Russell Packard Development, Inc. v. Carson*, 108 P.3d 741, 745 (Utah 2005). Petitioner argued in her Petition for Writ of Certiorari that "[t]he Court of Appeals erred in deciding the matter on the basis of a statute of limitations defense which was neither plead nor properly before the trial court."

DETERMINATIVE PROVISIONS OF LAW

Rules 8(c), 9(h), 12(h), and 15(a) of the Utah Rules of Civil Procedure are determinative of this appeal. The text of these Rules are included in the appendix.

STATEMENT OF THE CASE

NATURE OF THE CASE AND CORE OF THE PROCEEDINGS BELOW

This is a civil case seeking to quiet title of Plaintiff's (hereinafter referred to as "Petitioner") primary residence sold at a sheriff's sale for $1,550.00. This quiet title action was commenced on January 5, 2004, wherein Petitioner claimed ownership to certain real property located in Salt Lake County, State of Utah. Petitioner's Complaint

asserted that the property was hers by virtue of a Chapter 13 bankruptcy proceeding in which the property was vested in her following confirmation of her Chapter 13 Plan, and that the property was hers by virtue of her adverse possession of the property. (R. at 1 – 4.)[1] The Defendant ("referred to hereinafter as Respondent") answered on February 2, 2004, denying the material allegations of the Complaint, and asserting affirmative defenses based upon waiver and estoppel; failure of consideration; failure to mitigate damages; statute of frauds; a general claim that the statute of limitations had run; and a denial that Petitioner had any proper title to the property prior to filing for bankruptcy. (R. at 11– 14.) The Petitioner filed a motion for summary judgment on June 1, 2004. (R. at 30 – 113.) Respondent then filed a counter-motion for summary judgment on November 2, 2004 (R. at 246) and, subsequently, sought leave to amend its Answer to state with specificity its statute of limitations defenses. (R. at 321 – 322; 331 – 338.).

On February 14, 2005, the Court conducted oral argument on the parties' cross motions for summary judgment, and granted Petitioner's motion. (R. at 363; *see* Addendum A.) Following several objections by Respondent to Petitioner's proposed Order in the case, the Court entered its own Order on May 4, 2006. In its Order, the

---

[1] The District Court docket sheet lists a number of the documents referred to herein as having "no date," apparently because the Court's original date stamp is missing from the Record as filed. At the time of the filing of the appeal in this case, the District Court was unable to locate its original file, and the parties assisted the Court in reconstructing the file and submitting it to the Court as the record herein. Throughout her brief herein, the Plaintiff will refer to dates reflected on the copies of documents which have now been received as the record, whether or not the Court's original date stamp appears thereon.

Court rejected Respondent's statute of limitation defense and quieted title to the property in favor of Petitioner. (R. at 490 – 492; *see* Addendum B.) The Respondent filed a Notice of Appeal on May 31, 2006. (R. at 494). The matter was argued before the Court of Appeals on March 24, 2008. The Court of Appeals issued its opinion on May 1, 2008, reversing the trial court's decision and granting summary judgment in favor of Respondent. Petitioner filed a Petition for Writ of Certiorari on July 2, 2008. The Supreme Court granted the Petition for Writ of Certiorari on September 17, 2008.

STATEMENT OF FACTS

This case concerns the ownership of real property, which was sold to Respondent at a defective sheriff's sale on March 8, 1996 (R. at 490-491). Petitioner brought this action to quiet title to the property on January 5, 2004. (R. at 1-4). Respondent answered the complaint averring generally a statute of limitations defense which precluded the action. (R. at 11-14). Contemporaneous therewith, Respondent filed a Motion to Dismiss on grounds unrelated to a statute of limitations defense. (R. at 18-19). Both Petitioner and Respondent then filed cross-motions for summary judgment which were submitted for decision on December 2, 2004. (R. at 344-349).

On December 2, 2004, Respondent submitted a Motion for Leave to Amend Answer. (R. at 358-359). Oral arguments on the cross-motions for summary judgment were heard on February 14, 2005. (R. at 363). The Court granted Petitioner's Motion for Summary Judgment and entered its own Order in the case on May 4, 2006, making certain findings, quieting title to the property in favor of Petitioner, and rejecting the

Respondents' statute of limitations defense. (R. at 490 – 492). The Respondent filed a Notice of Appeal on May 31, 2006. (R. at 494). The matter was argued before the Court of Appeals on March 24, 2008. The Court of Appeals issued its opinion on May 1, 2008, reversing the trial court's decision and granting summary judgment in favor of Respondent. *Bangerter v. Petty*, 184 P.3d 1249, 1255 (Utah Ct. App. 2008)

Respondent only cited statutes for its statute of limitations defense in its Rule 56(f) Motion for Order of Continuance to Conduct Discovery, Reply Memorandum in Support of Defendant's Motion for Summary Judgment, and Motion for Leave to Amend Answer. *Id.* at 1253. Respondent's Motion for Leave to Amend Answer was not granted by the trial court.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING RESPONDENT SUFFICIENTLY AND TIMELY PRESENTED ITS STATUTE OF LIMITATIONS DEFENSES.

A. The statute of limitations defense is an affirmative defense, which can be, and in this case, was waived.

A defendant in a civil suit can and will waive its statute of limitations defenses if it fails to raise them affirmatively in a responsive pleading or a motion to dismiss, unless an amended pleading asserting the defense is allowed pursuant to the requirements of Rule 15(a). *Staker v. Huntington Cleveland Irr. Co.*, 664 P.2d 1188, 1190 (Utah 1983); *Gill v. Timm,* 720 P.2d 1352, 1353--54 (Utah 1986) ("[a]ffirmative defenses must be set forth in responsive pleadings and are usually waived if not so pleaded."); *Goelts v. Continental*

Bank and Trust Co., 299 P.2d 832 (Utah 1956); *James v. Galetka*, 965 P.2d 567, 571 (Utah Ct. App. 1998) ("In civil cases, a statute of limitations must be pleaded as an affirmative defense, or it is waived."); *American Coal Co. v. Sandstrom*, 689 P.2d 1, 4 (Utah 1984). The section of the applicable statute must be specifically pleaded and if the section pleaded is not applicable, it does not avail defendant that the action may be barred by another section not pleaded. *American Theatre Co. v. Glasmann*, 80 P.2d 922, 923 (Utah 1938).

In its decision, the Court of Appeals enumerates four ways in which the defendant raised an appropriate statute of limitations defense, and in each it errs. *Bangerter v. Petty*, 184 P.3d 1249, 1253 (Utah Ct. App. 2008). A defendant may only raise the statute of limitations defense in one of three ways: in a responsive pleading in accordance with Rule 9(h) of the Utah Rules of Civil Procedure; in a motion to dismiss; or in an amended pleading pursuant to the requirements of Rule 15(a) of the Utah Rules of Civil Procedure. *Staker v. Huntington Cleveland Irr. Co.*, 664 P.2d 1188, 1190 (Utah 1983).

Rule 8(c) of the Utah Rules of Civil Procedures states in part that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively ...statute of limitations...and any other matter constituting an affirmative defense. Utah R. Civ. P 8(c) (2004). Rule 9(h) of the Utah Rules of Civil Procedure specifies and provides:

> (h) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, *referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating*

> *the provision relied upon sufficiently clearly to identify it.* If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

Utah R. Civ. P. 9(h) (2004) (emphasis added). Rule 12(h) of the Utah Rules of Civil Procedure states in part that "[a] party waives all defenses and objections not presented either by motion or by answer or reply." Utah R. Civ. P. 12(h) (2004).

This Court has long held that the Utah Rules of Civil Procedure require the statute of limitations defense to be sufficiently and timely presented or it is waived. As recent as 2002, this Court reiterated this rule when it stated that "affirmative defenses should be set forth in responsive pleadings" and in some cases "a motion to dismiss under rule 12(b)(6) may raise affirmative defenses." *Tucker v. State Farm Mut. Automobile Ins. Co.*, 53 P.3d 947, 949--950 (Utah 2002).

In this case, the Court of Appeals looks beyond the Respondent's responsive pleading and motion to dismiss in extrapolating a statute of limitations defense, and errs in doing so. The Respondent failed to plead a statute of limitations defense as required by the rules, but instead states in his responsive pleading, "Plaintiff's claim against Respondents is barred under the doctrine of statute of limitations."(R. at 13).

The defendant failed to raise the defense appropriately because he failed to refer to or describe, *"such statute specifically and definitely by section number, subsection designation, if any,"* or at the very least failed to designate, "the provision relied upon sufficiently clearly to identify it." Utah R. Civ. P. 9(h). The Respondent did file a motion to dismiss, but the motion did not seek dismissal of the case, but instead, dismissal

of a party, and did not raise any affirmative defenses. (R. at 18-19). Based on the Utah Rules of Civil Procedure and this Court's precedent, Respondent's general language in its Answer alleging a statute of limitations defense is insufficient to preserve the defense, and therefore is waived.

B. Neither the Utah Rules of Civil Procedure nor the controlling precedent of this Court, allows the Court of Appeals to conclude the statute of limitations defense was sufficiently and timely plead by the Respondent.

The Court of Appeals erroneously cites the following four ways the Respondent plead the statute of limitations defense, each of which depart from the rules of civil procedure and this Court's rule of law: 1) raising the statute of limitations generally in the answer; 2) by motion for order of continuance to conduct discovery, and related memorandum in support, dated November 23, 2004; 3) by reply memorandum in support of Respondent's motion for summary judgment, dated November 23, 2004; and 4) by amended answer. *Bangerter v. Petty*, 184 P.3d 1249, 1253 (Utah Ct. App. 2008).

Respondent presented different, and inconsistent statutes of limitations - in the Answer Respondent raised a general statute of limitations defense without citing to a specific code section (R. 11-14); in its Motion and Memorandum for Order of Continuance to Conduct Discovery it raised §78-12-28 and §78-12-26 (R. at 127); in its Reply Memorandum in Support of Defendant's Motion for Summary Judgment it raised §78-12-25(3) ; and in its Motion to Amend Answer it raised §78-12-25(3) as a sole and singular statute of limitations defense. (R. at 337). The manner in which Respondent

raised these defenses was inconsistent with the rules of civil procedure and the precedent set by this Court. In all cases, the Respondent failed to raise an appropriate statute of limitations defense. The Court of Appeals erred in finding Respondent sufficiently and timely plead an applicable statute of limitations defense.

C. The Respondent was not granted leave to amend its Answer, and therefore did not present a sufficient and timely statute of limitations defense.

This court in *Staker v. Huntington Cleveland Irr. Co.*, also noted that a statute of limitations defense that is not properly raised in an answer or motion to dismiss is waived unless an amended pleading asserting the defense is allowed pursuant to the requirements of Rule 15(a). 644 P.2d 1188, 1190 (Utah 1983). Utah Rule of Civil Procedure 15(a) provides the following: A party may amend his pleading once as a matter of course at any time before a responsive pleading is served...*[o]therwise a party may amend his pleading only by leave of court or by written consent of the adverse party*. Utah R. Civ. P. 15(a) (emphasis added).

In regards to Utah Rules of Civil Procedure 15(a) this Court in *Staker v. Huntington Cleveland Irr. Co.*, stated that "[a] trial court's refusal to grant leave to amend is not reversible error unless the denial constitutes an abuse of discretion," and that "[a]s a general proposition, we will not reverse a trial court's denial of a motion to amend...to assert the statute of limitations as a defense." 644 P. 2d 1188, 1190. This Court placed special emphasis on the following relevant facts from *Staker*:

> Plaintiff, in going to the expense of discovery and preparing for trial, relied on defendant's answer filed over two years prior to trial. Plaintiff pleaded his case and responded to discovery with specificity, setting forth all relevant facts, events, and dates. The essential facts upon which the statute could have been asserted were known to the defendant from the beginning. Defendant alleges no surprise, discovery of new evidence relating to the defense, or other justification for its delay in asserting the statute of limitations. Plaintiff's case was not subject to the evidentiary difficulties that statutes of limitation are designed to prevent, such as lost evidence, faded memories, and absent witnesses. If a case is truly stale, a motion to amend an answer to assert the statute of limitations may be granted. In the instant case, however, nearly all the essential evidence was available and preserved in documentary form, and the important participants in the transactions at issue were available to testify at trial. To have permitted an amendment under those circumstances would have only made pointless and wasteful the time and expense that had been expended in preparing the case for trial.

Id. Ultimately, this Court in *Staker* affirmed the Court of Appeals decision denying the statute of limitations defense and upheld the denial of the motion to amend the answer. *Id.* at 1191.

Respondent's Motion for Leave to Amend Answer in this case was not granted by the Trial Court. There are several facts in this case which are similar to the facts in *Staker.* First, Petitioner filed her Complaint, which plead with particularity all necessary dates, and events, on January 5, 2004. (R. at 1-4). Respondent filed its Answer contemporaneous with its Motion to Dismiss on February 2, 2004.(R. at 11-21). The Petitioner relied on Respondent's Answer and has spent a lot of time and gone to great expense in pursuing this case. Second, all of the essential facts upon which the statute could have been asserted were known to the defendant from the beginning because the Petitioner pleaded her case with specificity, setting forth all relevant facts, events, and

dates. (R. at 1-4). Third, Respondent alleges no surprise, discovery of new evidence relating to the defense, or other justification for its delay in asserting the statute of limitations defense. Fourth, Petitioner's case is not subject to the evidentiary difficulties that statutes of limitation are designed to prevent, such as lost evidence, faded memories, and absent witnesses. The instant case concerns real property transactions and court records, all the essential evidence was available and preserved in documentary form, and the important participants in the transactions at issue were available to testify.

In this case, just as in *Staker*, to have permitted an amended answer under the circumstances described above would have only made pointless and wasteful the time and expense expended by Petitioner. The Respondent was not granted leave to amend its answer, and as a result, there were no statute of limitations defenses sufficiently and timely plead in the matter.

II. THE COURT OF APPEALS ERRED IN OVERRULING THE TRIAL COURT ON THE BASIS OF A STATUTE OF LIMITATIONS DEFENSE WHICH WAS NOT PROPERLY PLEAD BY THE RESPONDENT.

The Respondent's arguments concerning the statute of limitations failed because it waived all such defenses. The trial court specifically found, "The defendants' arguments concerning the statute of limitations and whether the plaintiff was required to bring her defective deed action against the Sheriff of Salt Lake County are denied." (R. at 491). The trial court was justified in denying such argument because the Respondent waived its statute of limitations defense according to the Utah Rules of Civil Procedure and this Court's controlling precedent.

As stated above, this Court has well established precedent that affirmative defenses, particularly a statute of limitations defense, must be plead with particularity in the responsive pleading or motion to dismiss or it will be waived. This general rule has been set aside by the Court of Appeals' decision, which undermines consistent and lengthy case history.

CONCLUSION

The Court of Appeals erred in holding Respondent sufficiently and timely presented its statute of limitations defenses, because the Respondent failed to appropriately raise them and in so doing, waived them. The Court of Appeals decision ignores the precedent established by this Court and uproots the well established pleading requirements of affirmative defenses in the State of Utah. This Court should follow precedent and overturn the Court of Appeals decision and affirm the Trial Court's decision.

DATED this 12th day of November, 2008.

Ryan M. James
Attorney for Appellee and Petitioner

James C. Haskins
Attorney for Plaintiff, Appellee and Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 2008, I caused to be served by HAND DELIVERY two true and correct copies of the foregoing Petitioner's Brief, as follows:

Ralph Petty
10 W. Broadway, Suite 800
Salt Lake City, Utah 84101

Vanessa Cattett

APPENDIX

A. OPINION dated May 1, 2008 by the Honorable Judith M. Billings, Court of Appeals of Utah, reversing the district Court's grant of summary judgment in favor of Plaintiff and directing the trial court to grant summary judgment in Defendant's favor.

B. ORDER entered May 4, 2006, by the Honorable Mark S. Kouris.

C. Rule 8(c) of the Utah Rules of Civil Procedure (2004).

D. Rule 9(h) of the Utah Rules of Civil Procedure (2004).

E. Rule 12(h) of the Utah Rules of Civil Procedure (2004).

F. Rule 15(a) of the Utah Rules of Civil Procedure (2004).

Tab A

BANGERTER v. PETTY
184 P.3d 1249 (UT 2008)
2008 UT App 153

Sonya Capri BANGERTER, Plaintiff and Appellee,
v.
Ralph PETTY, an individual; Jarmaccc Properties, LLC, a Utah limited liability company; Jarmaccc, Inc., a Utah corporation; and John Does 1 through 10, individuals and entities whose true names are unknown, and who may claim some right, title, estate, lien, or interest in real property owned by Plaintiff, Defendants and Appellants.

No. 20060511-CA.
Court of Appeals of Utah.

May 1, 2008

Appeal from the Third District, Salt Lake Department, Mark S. Kouris and Stephen L. Roth, JJ.

Ralph C. Petty, Salt Lake City, for Appellants.

James C. Haskins and Thomas N. Thompson, Salt Lake City, for Appellee.
Before GREENWOOD, P.J., BILLINGS, and ORME, JJ.

OPINION

BILLINGS, Judge:

¶ 1 Defendants Ralph Petty, Jarmaccc Properties, LLC, and Jarmaccc, Inc. (collectively Jarmaccc) appeal the trial court's grant of summary judgment in favor of Plaintiff Sonya Capri Bangerter. Specifically, Jarmaccc argues that the trial court erred in determining that a sheriff's sale of Ms. Bangerter's house (the Property) is void because the sheriff's sale included an incorrect legal description or is estopped under the doctrine of equitable estoppel. We reverse and remand for proceedings consistent with this opinion.

BACKGROUND

¶ 2 Ms. Bangerter and her former husband Roger Scott Bangerter(fn1) purchased the Property in April 1994. Ms. Bangerter had an outstanding bill owed to her dentist, which was turned over to the North American Recovery Services collection agency (N.A.R.). On April 25, 1995, a judgment was entered against the Bangerters in the amount of $307.46. On August 14, 1995, a trial judge signed a writ of execution commanding the sheriff "to collect the judgment, with costs, interest, and fees, and to sell enough of defendant's non-exempt real property to satisfy the same."

¶ 3 On December 21, 1995, a deputy sheriff filed a notice of real estate levy against the Property. The notice stated:

> Notice is hereby given, that under and by virtue of a Writ of Execution, issued out of the Circuit Court of the State of Utah, of which the annexed is a true copy, I have this day attached and levied upon all right, title, claim and interest of defendant(s), of, in and to the following described Real Estate, standing on the records of Salt Lake County, in the name of defendant, [] Bangerter, and particularly described as follows: BEG 67 FT E & 69 FT N OF SW COR LOT 68, GLENDALE PARK SUB, PLAT A; N 60 FT; E 120 FT TO BEG. 0.19 AC.

¶ 4 On March 8, 1996, the deputy sheriff signed a real estate certificate of sale execution against the Property, which was filed for record with the county recorder's office on March 28, 1996. The real estate certificate of sale identified the parties, case number, and the dates of the judgment rendered, execution issued, and sale of the Property. It also stated, in relevant part:

> I hereby certify that under an Execution issued out of the Court in and for Salt Lake County, State of Utah, in an action pending in said Court in the above named suit, I was commanded to take the sum of $263.56, with interest, costs and Sheriff's fees, amounting in all to the sum of $958.02, to satisfy the judgment in said action by selling the unexempted real property of the said defendant. I have levied upon, and . . . after due and legal notice I sold at public auction, according to law, the real property to Jarmac[cc] L.L.C., for the sum of $1,550.00, which was the highest bid made for all the right, title, claim and interest of said defendants. . . . I further certify that said property is subject to redemption in lawful money of the United States of America, pursuant to the statute in such cases made and provided.

This document also included the same property description listed in the notice of levy.

¶ 5 The rules of civil procedure that were in effect at the time required the sheriff to

> serve upon the judgment debtor, in the same manner as service of a summons in a civil action, or cause to be transmitted by both regular and certified mail, returned receipt requested, to the judgment debtor's last known address as provided by the judgment creditor, (i) the notice of execution and exemptions and right to a hearing, and (ii) the application by which the judgment debtor may request a hearing. Upon service of the writ, the sheriff or constable may also set the date of sale or delivery and serve upon the judgment debtor notice of the date and time of sale or delivery in the same manner as service of the notice of execution and exemptions and right to a hearing.

Utah R. Civ. P. 69(g) (2004).

¶ 6 On September 16, 1996, a sheriff's deed was signed by the sheriff and N.A.R., explaining that the sheriff had sold the Property according to law to N.A.R. for $1550 and that no redemption had been made. On November 12, 1996, Petty filed a request for notice concerning the Property, requesting notices of default or sale. On November 16, 1996, the sheriff's deed was recorded, noting (1) certain legal property was sold at a sheriff's sale on March 5, 1996, to N.A.R. for $1550, (2) more than six months had elapsed without any redemption of the property, and (3) the property was sold. The sheriff's deed conveyed the property to N.A.R. It also included the same property description as mentioned above.

¶ 7 On January 5, 1998, the sheriff filed an amended real estate certificate of sale execution. The

amended certificate of sale execution identified the property as:

> Beginning at a point 670 feet East and 69 feet North of the Southwest corner of Lot 68, GLENDALE PARK SUBDIVISION, PLAT "A", Salt Lake City, Utah, being in the Southwest quarter of Section 11, Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running thence North 69 feet; thence East 120 feet; thence South 69 feet; thence West 120 feet to the point of beginning. SIDWELL # 15-11-331-010.

¶ 8 On January 20, 1998, N.A.R. filed a quitclaim deed in favor of Jarmaccc Properties, LLC, regarding the Property. On March 10, 1998, Bangerter filed a Chapter 13 bankruptcy petition. On May 14, 1998, Jarmaccc served Bangerter with a notice to quit, instructing her to vacate the Property, but this could not be pursued because of her pending bankruptcy action.

¶ 9 On April 23, 1999, Bangerter filed a second petition in bankruptcy. As part of her Chapter 13 plan, Bangerter listed Jarmaccc as a secured creditor and scheduled $1200 to be paid to Jarmaccc. Jarmaccc received a copy of Bangerter's bankruptcy plan but did not object. Bangerter paid Jarmaccc the full amount set out by the bankruptcy plan. The bankruptcy was dismissed on August 26, 2003 because of Bangerter's

failure to make payments, and no discharge was granted.

¶ 10 On January 6, 2004, Bangerter filed this action against Jarmaccc, seeking quiet title to the Property. On July 2, 2004, Bangerter filed a third Chapter 13 bankruptcy petition. During the pendency of the bankruptcy action, both parties filed motions for summary judgment to resolve the case. The court ruled in Bangerter's favor on May 4, 2006.

¶ 11 The trial court found:

> 1. The original sale of [Bangerter's] property contained an incorrect legal description and thus created a defective title which failed to convey any title to [Jarmaccc] or any other person or entity;
>
> 2. Jarmaccc Properties, L.L.C., was on notice of [Bangerter's] bankruptcy filing;
>
> 3. Jarmaccc Properties, L.L.C., received a copy of and failed to object to [Bangerter's] proposed Chapter 13 plan;
>
> 4. [Bangerter] paid [Jarmaccc] the full amount set out by the bankruptcy plan;
>
> 5. [Bangerter] will be injured if [Jarmaccc] is allowed to contradict its actions in accepting the payments made pursuant to the Chapter 13 plan;
>
> . . . .
>
> 7. [Jarmaccc's] arguments concerning the statute of limitations and whether [Bangerter] was required to bring her defective deed action against the Sheriff of Salt Lake County are denied.

The trial court then quieted title in Bangerter and extinguished any claim by Jarmaccc to the Property. This appeal followed.

ISSUE AND STANDARD OF REVIEW

¶ 12 Jarmaccc argues that the trial court erred in concluding no statute of limitations barred Bangerter's action and granting summary judgment in favor of Bangerter. "Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Because summary judgment presents only questions of law, we give no deference to the district court's legal decisions and review them for correctness." *Fericks v. Lucy Ann Soffe Trust,* 2004 UT 85, ¶ 10, 100 P.3d 1200 (citing Utah R. Civ. P. 56(c)).(fn2)

ANALYSIS

¶ 13 Jarmaccc argues that Bangerter's suit is barred by the expiration of the statute of limitations. Jarmaccc asserts that the tolling date for the statute of limitations is January 20, 1998, the day N.A.R. conveyed the Property to Jarmaccc, or at the very latest, March 10, 1998, when Bangerter filed her first petition for bankruptcy. Jarmaccc contends that Bangerter "knew of" Jarmaccc before that date. Bangerter did nothing to attack either the sheriff's sale or Jarmaccc's ownership of the Property until she filed this action on January 6, 2004, almost six years later.(fn3)

¶ 14 On appeal, Jarmaccc offers three possible statutes of limitations which might bar Bangerter's action: Utah Code section 78-12-28(1), *see* Utah Code Ann. § 78-12-28(1) (2002) ("[a]n action may be brought within two years against a . . . sheriff . . . for liability incurred by the doing of an act in his official capacity"), Utah Code section 78-12-26(3), *see id.* § 78-12-26(3) (2002) ("[a]n action may be brought within three years . . . for relief on the ground of . . . mistake"), or the general statute of limitations, Utah Code section 78-12-25(3), *see id.* § 78-12-25(3) (2002) ("[a]n action may be brought within

four years . . . for relief not otherwise provided for by law."). We need not analyze which of the three statutes of limitations is relevant as all of them expired before Bangerter brought her suit.

I. Was the Affirmative Defense of Statute of Limitations Properly Pleaded?

¶ 15 Bangerter argues that the statute of limitations cannot bar her lawsuit because it was not specifically pleaded and proved at trial. Rule 9(h) of the Utah Rules of Civil Procedure mandates:

> In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, *referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it.* If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

Utah R. Civ. P. 9(h) (emphasis added).

¶ 16 In its first answer, Jarmaccc raised the statute of limitations by stating simply that "Plaintiff's

claim against Defendants is barred under the doctrine of statute of limitations." However, our review of the record shows that in Jarmaccc's Rule 56(f) Motion for Order of Continuance to Conduct Discovery, dated June 15, 2004, and the accompanying memorandum in support, Jarmaccc quite clearly laid out its arguments concerning the various statutes of limitations. It offered both Utah Code section 78-12-26 and Utah Code section 78-12-28 as possible statutes of limitations that would bar Bangerter's claim. *See* Utah Code Ann. §§ 78-12-26, -28. Jarmaccc again explained its argument in its Reply Memorandum in Support of Defendant's Motion for Summary Judgment, dated November 23, 2004, and filed an amended answer which included Utah Code section 78-12-25(3), the general statute of limitations. Furthermore, the trial court considered and ruled upon these arguments.

¶ 17 Bangerter argues that *Conder v. Hunt,* 2000 UT App 105, 1 P.3d 558, prevents Jarmaccc from relying on its statute of limitations argument. In *Conder,* the defendants specifically pleaded two statutes of limitation, one for written contracts, and one for fraud. *See id.* ¶ 13. However, in their motions for summary judgment, the defendants argued only the statute applicable to fraud actions. *See id.* This court rejected the defendants' argument on the grounds that the plaintiffs had not actually alleged fraud in their complaint, but rather styled their complaint as one to quiet title. *See id.* ¶ 14. We concluded that because the defendants had not shown that their chosen statute of limitations applied, we would not consider other statutes of limitation that might have applied. *See id.* ¶¶ 14, 17. We find this case distinguishable from the one before us.

¶ 18 Bangerter and the trial court clearly had written notice of the three statutes of limitations at issue from documents filed with the court, including an amended answer. In fact, the trial court ruled on the issue. Moreover, which statute of limitations is applicable is irrelevant because all of the statutes Jarmaccc pleaded had passed before Bangerter brought her lawsuit.

II. Quiet Title Action--No Statute of Limitations

¶ 19 The trial court may have determined that the statute of limitations arguments were without merit because, in Utah, no statute of limitations applies to a "suit[] brought to quiet the title to real property." *See In re Hoopiiaina Trust,* 2006 UT 53, ¶ 26, 144 P.3d 1129.

¶ 20 In *In re Hoopiiaina Trust, id.,* the Utah Supreme Court clarified the rule on statutes of limitations concerning actions to quiet title. We quote liberally:

> [I]t is clear that all actions, whether legal or equitable, are subject to a statute of limitations in Utah. However, suits brought to quiet the title to real property have always been an exception to this rule. A true quiet title action is a suit brought "to quiet *an existing title* against an adverse

> or hostile claim of another," and "the effect of a decree quieting title is not to *vest* title but rather is to *perfect* an existing title as against other claimants." *Thus, the question becomes whether a claim is a true quiet title action or whether the claimant really seeks other relief; if the claim is a true quiet title action, it is not subject to a statute of limitations.* Courts must proceed cautiously when applying this rule, however, for parties should not be able to avoid the statute of limitations on other claims by simply disguising them as claims for quiet title relief.
>
> . . . [A] court must examine the relief sought in order to determine whether the statute of

> limitations applies. When a party asserts a quiet title claim in which that party merely requests that the court adjudicate the validity of an opponent's adverse or hostile claim to property to which the party already holds title, no statute of limitations applies. In other words, if it is not necessary that the court grant other relief in favor of the party, such as cancelling a deed on the basis of fraud, in order to rule on the quiet title claim, then the statute of limitations cannot operate as a bar to the party's quiet title claim. *Thus, in order to determine whether the statute of limitations applies to a quiet title claim, the court must assess on what basis the party would be entitled to have title quieted. If the party is entitled to have title quieted only if the court first finds in his or her favor on another legal issue, then the same statute of limitations that applies to that legal issue will also apply to the quiet title claim.* Similarly, a party may seek to quiet title to real property in addition to requesting other relief in the same action. Despite the fact that no statute of limitations applies to a true quiet title claim, the respective statutes of limitation applicable to the party's other claims for relief may operate to bar those claims. *If the party's claim for quiet title relief can be granted only if the party succeeds on another claim, then the statute of limitations applicable to the other claim will also apply to the quiet title claim.*

Id. ¶¶ 26-27 (last three emphases added) (citations omitted).

¶ 21 We must evaluate, then, whether Bangerter's action is a "true" quiet title claim. We conclude that it is not. Bangerter's suit against Jarmaccc is necessarily predicated on a challenge to the validity of the sheriff's sale and the title deed which was a result of that sale. Without that underlying challenge, she has no claim against Jarmaccc, who rightfully received the Property from N.A.R., who fairly purchased it at a sheriff's sale. In fact, without first challenging the sheriff's sale, Bangerter does not have title to the Property and cannot quiet it. Thus, Bangerter can only succeed on an action to quiet her title to the Property if the court first invalidates the sheriff's sale. Bangerter's action here is thus not a "true" action to quiet title, and, under *Hoopiiaina,* some statute of limitations applies. *See id.* As previously noted, it is irrelevant which statute of limitations applies, because they all passed prior to Bangerter's initiation of this lawsuit.

¶ 22 Bangerter attempts to distinguish *Hoopiiaina* from this case. She argues that *Hoopiiaina* did not deal with a situation where someone was in "actual and continuous possession of the property." She relies on *Conder v. Hunt,* 2000 UT App 105, 1 P.3d 558, which was decided before *Hoopiiaina* and in dicta "recognize[d] the general rule . . . that those in actual possession of real estate are never barred by any statute of limitation from seeking to quiet their title." *Id.* ¶ 17. In *Conder,* we noted that "[w]hile no Utah case cited by the parties specifically adopts this rule, a number of cases seem to assume that Utah adheres to it." *Id.* We specifically stated that "a definitive ruling on the question must await a case in which it is more squarely in issue." *Id.*

¶ 23 We conclude *Conder* and *Hoopiiaina* are consistent. A person in possession who seeks to quiet their *own* title is not barred by any statute of limitations. In this case, Bangerter no longer had the title to the Property. Thus, Bangerter is not pursuing a "true" quiet title action because she did not have

the title to the Property at the time she was in possession of the Property and brought her lawsuit. She therefore is not free from the constraints of a statute of limitations. Accordingly, we conclude that the statute of limitations bars her suit.

¶ 24 We reverse the trial court's grant of summary judgment in Bangerter's favor, and direct the trial

court to grant summary judgment in Jarmaccc's favor because Bangerter's lawsuit is barred by the statute of limitations.

¶ 25 I CONCUR: PAMELA T. GREENWOOD, Presiding Judge.

¶ 26 I CONCUR IN THE RESULT: GREGORY K. ORME, Judge.

Footnotes:

FN1. The Bangerters divorced in April 2000. Sonya Bangerter was awarded the Property as part of the divorce settlement. Although her husband's name appears on the writ of execution, no party has mentioned him as part of this lawsuit.

FN2. Jarmaccc raises additional issues on appeal. However, because we conclude that the trial court did not err in concluding no statute of limitations barred Bangerter's action, we do not address the other issues raised on appeal.

FN3. In a signed affidavit dated June 1, 2004, Bangerter states "I never received any notice from any person that my home would be sold to any party as the result of the debt for dental services." This statement is in conflict with the sheriff's sworn statements in the certificate of sale that he complied with the notice requirements. However, this factual question is ultimately immaterial because we conclude all the potentially applicable statutes of limitations expired before she brought her actions to void the title received pursuant to the sheriff's sale. Further, she does not deny receiving the May 14, 1998 Notice to Vacate Property and, in fact, in 1999 listed Jarmaccc as a secured creditor in her Chapter 13 bankruptcy plan.

UT

P.3d

Tab B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SONIA CAPRI BANGERTER,	:	ORDER
Plaintiff,	:	CASE NO. 040900081
vs.	:	
RALPH PETTY, an individual, et al.,	:	Judge Mark S. Kouris
Defendants.	:	

Before this Court is the defendants' Objection to the proposed Order granting the plaintiff's Motion for Summary Judgment, the defendants' Motion for Restitution, and other miscellaneous matters. This Court heard the Motion for Summary Judgment on February 14, 2005, with Thomas N. Thompson of Haskins & Associates, L.L.C., representing the plaintiff, and Ralph Petty, of counsel with Berrett & Assoc., L.C., representing the defendants. The Court granted the plaintiff's Motion for Summary Judgment. The defendant then filed an Objection to the proposed Order and a Motion for Restitution. The Court conducted a second hearing on April 18, 2005. Both attorneys were present. The Court finds the following:

1. The original sale of the plaintiff's property contained an incorrect legal description and thus created a defective title

which failed to convey any title to the defendant or any other person or entity;

2. Jarmaccc Properties, L.L.C., was on notice of the plaintiff's bankruptcy filing;

3. Jarmaccc Properties, L.L.C., received a copy of and failed to object to the plaintiff's proposed Chapter 13 plan;

4. The plaintiff paid the defendant the full amount set out by the bankruptcy plan;

5. The plaintiff will be injured if the defendant is allowed to contradict its actions in accepting the payments made pursuant to the Chapter 13 plan;

6. Jarmacc Inc. and Mr. Ralph Petty have disclaimed any interest in any property in this action, and the Court therefore finds that they have no claim or interest in the plaintiff's property;

7. The defendants' arguments concerning the statute of limitations and whether the plaintiff was required to bring her defective deed action against the Sheriff of Salt Lake County are denied.

This Court then hereby orders that the title to the real property

in dispute in this case, known as 1145 South 1100 West, City of Salt Lake City, County of Salt Lake, State of Utah, and more particularly described as:

> Beginning at a point 670 feet East and 69 feet North of the Southwest corner of Lot 68, GLENDALE PARK SUBDIVISION, PLAT "A", Salt Lake City, Utah, being in the Southwest quarter of Section 11, Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running thence North 69 feet; thence East 120 feet; thence South 69 feet; thence West 120 feet to the point of beginning. SIDWELL #15-11-1331-010.

is hereby quieted in the plaintiff and any claim in and to the real property by the defendants herein, or any of them, is hereby disallowed and extinguished.

It is further ordered that the defendants' Motion for Restitution ~~is denied~~.

Dated this 4th day of May, 2006.

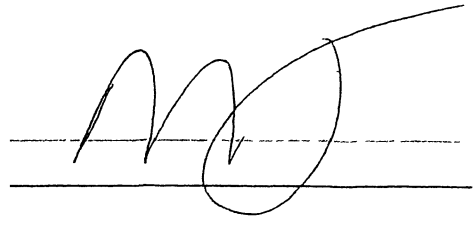
MARK S. KOURIS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Order, to the following, this 4 day of May, 2006:

James C. Haskins
Attorney for Plaintiff
357 South 200 East, Suite 300
Salt Lake City, Utah 84111

Ralph C. Petty
Attorney for Defendant
50 S. Main Street, Suite 530
Salt Lake City, Utah 84144



Tab C

Rule 8. General rules of pleadings.

(a) Claims for relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; form of denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

(d) Effect of failure to deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be concise and direct; consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of pleadings. All pleadings shall be so construed as to do substantial justice.

Tab D

(h) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

(i) Private statutes; ordinances. In pleading a private statute of this state, or an ordinance of any political subdivision thereof, or a right derived from such statute or ordinance, it is sufficient to refer to such statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statutes or ordinances. The court shall thereupon take judicial notice thereof.

(j) Libel and slander.

(j)(1) Pleading defamatory matter. It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was so published or spoken.

(j)(2) Pleading defense. In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

(k) Renew judgment. A complaint alleging failure to pay a judgment shall describe the judgment with particularity or attach a copy of the judgment to the complaint.

(l) Allocation of fault.

(l)(1) A party seeking to allocate fault to a non-party under Title 78, Chapter 27 shall file:

(l)(1)(A) a description of the factual and legal basis on which fault can be allocated; and

(l)(1)(B) information known or reasonably available to the party identifying the non-party, including name, address, telephone number and employer. If the identity of the non-party is unknown, the party shall so state.

(l)(2) The information specified in subsection (l)(1) must be included in the party's responsive pleading if then known or must be included in a supplemental notice filed within a reasonable time after the party discovers the factual and legal basis on which fault can be allocated but no later than the deadline specified in the discovery plan under Rule 26(f). The court, upon motion and for good cause shown, may permit a party to file the information specified in subsection (l)(1) after the expiration of any period permitted by this rule, but in no event later than 90 days before trial.

(l)(3) A party may not seek to allocate fault to another except by compliance with this rule.

Rule 9. Pleading special matters.

(a)(1) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. A party may raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity by specific negative averment, which shall include facts within the pleader's knowledge. If raised as an issue, the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

(a)(2) Designation of unknown defendant. When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name; provided, that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.

(a)(3) Actions to quiet title; description of interest of unknown parties. In an action to quiet title wherein any of the parties are designated in the caption as "unknown," the pleadings may describe such unknown persons as "all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto."

(b) Fraud, mistake, condition of the mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

(d) Official document or act. In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(f) Time and place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special damage. When items of special damage are claimed, they shall be specifically stated.

Tab E

Rule 12

Utah Rules

RULES OF CIVIL PROCEDURE

Part III Pleadings, Motions, and Orders

Rule 12 Defenses and objections.

Rule 12. Defenses and objections.

(a) When presented. Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within twenty days after the service of the summons and complaint is complete within the state and within thirty days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim shall serve an answer thereto within twenty days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders

that the hearings and determination thereof be deferred until the trial.

(e) Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available. If a party makes a motion under this rule and does not include therein all defenses and objections then available which this rule permits to be raised by motion, the party shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of defenses. A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) Pleading after denial of a motion. The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) Security for costs of a nonresident plaintiff. When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a $300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) Effect of failure to file undertaking. If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action.

Tab F

Rule 15. Amended and supplemental pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to conform to the evidence. When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.